

## HONORABLE THOMAS O. RICE

MICHAEL E. MCFARLAND, JR., #23000  
Evans, Craven & Lackie, P.S.  
818 W. Riverside, Suite 250  
Spokane, WA 99201-0910  
(509) 455-5200; fax (509) 455-3632  
Attorneys for Wenatchee School  
District and School District Defendants

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF WASHINGTON

I.V., a minor child; and APRIL OLIVARES and FERNANDO OLIVARES VARGAS, parents of I.V.,

## Plaintiffs,

Case No. 2:17-cv-00118-TOR

VS.

DEFENDANT WENATCHEE  
SCHOOL DISTRICT'S  
MOTION TO FOR SUMMARY  
DISMISSAL OF PLAINTIFFS'  
TITLE IX CLAIM

Y.A.F., a minor child, MARIA M. PEREZ FLORES, as guardian of Y.A.F., WENATCHEE SCHOOL DISTRICT NO. 246, a political subdivision.

## Defendants.

### Note on Motion Calendar:

Date: September 12, 2018

Time: 1:30 p.m.

## With Oral Argument

Spokane WA

DEFENDANT'S MOTION FOR SUMMARY  
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*Evans, Craven & Lackie, P.S.*  
818 W. Riverside, Suite 250  
Spokane, WA 99201-0910  
(509) 455-5200; fax (509) 455-3632

1 COMES NOW Defendant WENATCHEE SCHOOL DISTRICT, NO. 246  
2 (hereinafter “WSD”) and pursuant to Fed. R. Civ. P. 56 moves for summary  
3  
4 dismissal of Plaintiffs’ Title IX claim.

5  
6 **I. INTRODUCTION**

7 Plaintiff I.V.<sup>1</sup> alleges that he was harassed and bullied by a fellow male  
8 student (Y.A.F.). The harassment and bullying consisted of name-calling (“man  
9 boobs” and “fat” and “faggot” and “ugly”) and the physical acts of hitting,  
10 kicking, pushing, tripping and giving “titty twisters.” As is set forth herein, these  
11 acts of harassment and bullying are insufficient to support a Title IX claim, as  
12 there is no evidence that the harassment and bullying were “based on” or  
13 “because of” sex. While the term “faggot” and the act of “titty twisting” may  
14 have some sexual connotation, case law is clear that harassment and bullying that  
15 is not done “based on” or “because of sex” is not actionable to establish that  
16 Y.A.F. based on or because of sex, as opposed to a personal animosity against  
17 I.V. or because of I.V.’s weight. In addition, I.V. is unable to establish that a  
18 WSD official had “actual knowledge” that he was being sexually harassed and  
19 acted with deliberate indifference to the same. Summary judgment is thus proper.

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1 Plaintiffs will collectively be referred to as “I.V.”

## II. STATEMENT OF FACTS

Pursuant to LR 56.1(a), WSD has submitted a Statement of Undisputed Facts with the proper citations to the record. The following is a summary of those facts for the purpose of ease of reference.

I.V. entered Orchard Middle School (OMS) as a 6<sup>th</sup> grader for the 2013-2014 school year. I.V. alleges that starting in his 6<sup>th</sup> grade year, and continuing through January 4, 2016, he was harassed and bullied by Y.A.F.<sup>2</sup> According to I.V.'s testimony, Y.A.F. harassed and bullied him in the following ways:

- Name calling (“fat” and “faggot” and “man boobs” and “ugly”);
- Physical acts of hitting, kicking, pushing, tripping and giving “titty twisters.”

On January 29, 2015(I.V.'s 7<sup>th</sup> grade year), I.V. was hospitalized due to extreme weight loss. While I.V. was in the hospital, WSD counselor Ronda Brender talked with I.V.'s mother, April Olivares several times to check-in on how I.V. was doing. Ms. Brender asked Ms. Olivares if anything could be causing I.V. stress. In February 2015, Ms. Olivares, advised Ms. Brender that she had talked to I.V. and he reported that he was being bullied during physical education class and the locker room. At that point, I.V. had not disclosed the

<sup>2</sup> I.V. alleges in the Complaint that Y.A.F. “molested” I.V. The facts do not support that allegation. *Evans, Craven & Lackie, P.S.*

1 identity of the bully to anyone, including his mother. As such, Ms. Olivares did  
2 not identify to Ms. Brender the identity of the bully.  
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4 Ms. Olivares testified that she reported to Ms. Brender that the bullying  
5 consisted of name-calling (“fat” and “faggot”) and twisting of I.V.’s nipples. I.V.  
6 testified that as of February 2015, he had not disclosed the nature of the bullying  
7 to his mother. Regardless, upon receipt of Ms. Olivares’s report, Ms. Brender  
8 contacted the PE teacher, Steve Donaldson, and asked him if he had observed  
9 any bullying of I.V. Mr. Donaldson reported that he had not, but that he would  
10 keep an eye on I.V. to make sure he was not getting bullied. In addition, Ms.  
11 Olivares and Ms. Brender put together a plan for a new schedule for I.V. which  
12 did not include PE class. With the exception of April 11, 2015, I.V. did not  
13 return to school until the end of that school year (June 2<sup>nd</sup> through June 11<sup>th</sup>). No  
14 staff person observed any bullying of I.V. for the remainder of that year.  
15

16 The following school year (2015-2016) was I.V.’s 8<sup>th</sup> grade year. On  
17 January 3, 2016, I.V. finally disclosed to Ms. Olivares that he was being bullied  
18 by Y.A.F. Ms. Olivares reported the matter to law enforcement and Y.A.F. was  
19 arrested on January 4, 2016. On January 5, 2016, WSD emergency expelled  
20 Y.A.F. On January 6, 2016, WSD conducted a Manifest Determination Meeting  
21 and determined that Y.A.F.’s actions were not a  
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30 DEFENDANT’S MOTION FOR SUMMARY  
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818 W. Riverside, Suite 250  
Spokane, WA 99201-0910  
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function of his disability. As required by law, on February 1, 2016, WSD held a re-entry meeting to determine whether Y.A.F. could be re-admitted to OMS. On that date, or shortly thereafter, WSD learned that I.V. obtained an order of protection that precluded Y.A.F. from attending OMS. WSD therefore transferred Y.A.F. to another school.

M.V. is I.V.’s best friend. M.V. testified that once during I.V.’s and M.V.’s sixth grade year (2013-2014), and three times during their eighth grade year (2015-2016), he (M.V.) advised OMS Principal Taunya Brown that I.V. was being “picked on” and “bullied.” According to M.V., he did not disclose what the bullying entailed. M.V. also claims to have made the same report to teacher Terri Self.<sup>3</sup> I.V. did not report to any the harassment or bullying to any WSD staff member prior to January 3, 2016.

### III. LAW AND ARGUMENT

Title IX states: “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” 20 U.S.C. § 1681(a). A school district that receives federal funds may be liable for student-on-student harassment if the district (1) had

<sup>3</sup> Ms. Brown and Ms. Self deny that M.V. made any such report, but for the purpose of summary judgment, the Court must assume that such reports were made. *Evans, Craven & Luckie, P.S.*  
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1 actual knowledge of the harassment, (2) the harasser was under the district's  
 2 control, (3) the harassment was based on the victim's sex, (4) the harassment was  
 3 "so severe, pervasive, and objectively offensive that it effectively bar[red] the  
 4 victim's access to an educational opportunity or benefit," and (5) the district was  
 5 deliberately indifferent to the harassment. *See Davis ex rel. LaShonda D. v.*  
 6 *Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 650, 119 S.Ct. 1661 (1999).

10 **A. The Harassment And Bullying Of I.V. Was Not "Based On Sex."**

11 Whether conduct rises to the level of actionable harassment "depends on a  
 12 constellation of surrounding circumstances, expectations, and relationships,  
 13 including, but not limited to, the ages of the harasser and the victim and the  
 14 number of individuals involved." *Davis*, 526 U.S. at 651 (internal citations and  
 15 quotation marks omitted). In distinguishing actionable harassment under title VII  
 16 from that under title IX, the *Davis* Court explained that courts "must bear in  
 17 mind that schools are unlike the adult workplace and that children may regularly  
 18 interact in a manner that would be unacceptable among adults." *Id.* "[E]arly on,  
 19 students are still learning how to interact appropriately with their peers. It is thus  
 20 understandable that, in the school setting, students often engage in insults,  
 21 banter, teasing, shoving, pushing, and gender-specific conduct that is upsetting to  
 22 the students subjected to it." *Id.* at 651–52. Thus,

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 (509) 455-5200; fax (509) 455-3632

1 to be actionable, the harassment must be more than the sort of teasing and  
 2 bullying that generally takes place in schools; it must be “severe, pervasive, and  
 3 objectively unreasonable.” *Id.* at 652. The Court further warned, in response to  
 4 the concern that a school might be liable for *any* negative student interactions,  
 5 that courts should not be “mislead ... to impose more sweeping liability than”  
 6 what title IX requires. *Id.*

10 While same-sex sexual harassment is actionable under title IX, the  
 11 “offensive behavior, however, must still be based on sex, per the words of title  
 12 IX, and ‘not merely tinged with offensive sexual connotations.’” *Sanches v.*  
 13 *Carrollton-Farmers Branch Indep. Sch. Dist.*, 647 F.3d 156, 165 (5th Cir. 2011),  
 14 *citing Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 66 (1st Cir. 2002). “Title  
 15 IX was not intended and does not function to protect students from bullying  
 16 generally (as opposed to sexual harassment or gender discrimination) or to  
 17 provide them recourse for mistreatment that is not based on sex.” *Brodsky ex rel.*  
 18 *S.B. v. Trumbull Bd. of Educ.*, 2009 WL 230708, at 7 (D.Conn. Jan. 30, 2009). In  
 19 *Sanches*, the Fifth Circuit found that the alleged student harasser’s conduct of  
 20 calling the plaintiff a “ho”, discussing a rash on the plaintiff’s breast and starting  
 21 a rumor that the plaintiff had a hickey on her breast, and starting a rumor that the  
 22 plaintiff was pregnant were not based on the  
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1 plaintiff's sex, but instead were in response to a personal squabble between the  
 2 plaintiff and the harasser. The Court found the alleged conduct to be "more  
 3 properly described as teasing or bullying than as sexual harassment." *Id.* at 165–  
 4 66. In *Brodsky*, the court observed that the alleged harassment "was triggered by  
 5 a particular incident between the girls rather than by a general hostility on the  
 6 part of [the alleged harasser] toward other female students based on their  
 7 gender." 2009 WL 230708, at 7.

11 Here, I.V. cannot establish that the bullying by Y.A.F. was "on the basis of  
 12 sex." Y.A.F.'s use of terms related to I.V.'s weight (i.e., "fat" and "man boobs")  
 13 is clearly not harassment or bullying "based on sex." The same is true with  
 14 respect to the physical acts of hitting, kicking and pushing. Presumably, I.V. will  
 15 argue that use of the term "faggot," and Y.A.F.'s conduct in giving I.V. "titty-  
 16 twisters" are actionable under Title IX. Any such argument is unpersuasive.  
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21 Courts have held that the mere use of words with sexual connotations,  
 22 such as "faggot," are insufficient on their own to suggest harassment on the basis  
 23 of gender. *See, e.g., Preston v. Hilton Cent. Sch. Dist.*, 876 F. Supp. 2d 235, 243  
 24 (W.D.N.Y. 2012) ("the fact that A.P.'s harassers asked him embarrassing sexual  
 25 questions and used terms with sexual connotations, such as such as 'gay,'  
 26 'homo,' 'faggot' and 'bitch,' is insufficient to

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1 suggest that A.P. was harassed on the basis of his gender ...."); *Patenaude v.*  
 2 *Salmon River Cent. Sch. Dist.*, No. 3:03-cv-1016, 2005 WL 6152380, at 5  
 3 (N.D.N.Y. 2005) (observing in the context of a summary judgment motion that  
 4 although misogynist slurs suggest gender-based harassment against a female  
 5 student, the court "must be careful ... not to make broad generalizations" and  
 6 should instead examine the language in light of the "constellation of surrounding  
 7 circumstances, expectation and relationships which are not fully captured by a  
 8 simple recitation of the words used or the physical acts performed"); *Diebold v.*  
 9 *Hartford Pub. Schs.*, 2017 WL 4512575, at \*6 (W.D. Mich. 2017) (collecting  
 10 cases). Courts have been cautious in avoiding broad generalizations or  
 11 assumptions of such words since the Supreme Court has stated it has never held  
 12 that harassment "'is automatically discrimination because of sex merely because  
 13 the words used have sexual content or connotations.'" *Patenaude*, 2005 WL  
 14 6152380, at 5, quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75,  
 15 80 (1998). See also, *Manfredi v. Mount Vernon Bd. of Educ.*, 94 F. Supp. 2d 447,  
 16 454 (S.D.N.Y. 2000), ("teasing, kicking, shoving and pokes in the face are  
 17 annoying and hurtful to any child who is victimized by them," but such conduct,  
 18 "even if perpetrated by a child of one gender against a child of another gender—  
 19 is not actionable as 'sexual' harassment"); *Doe ex*

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1 *rel. Doe 2 v. Trico Cnty. Sch. Dist. No. 176*, 2012 WL 686811, at 5–6 (S.D. Ill.  
 2 2012), (“run-of-the-mill hitting and pinching that unfortunately occurs” in  
 3 schools “all too often” is insufficient to support a Title IX claim); *Estate of D.B.  
 4 by Briggs v. Thousand Islands Cent. Sch. Dist.*, 169 F.Supp.3d 320, 332, 2016  
 5 WL 945350 (N.D.N.Y. 2016) (“the slur ‘pussy’ is more likely to mean ‘coward’  
 6 than anything gender related.”); *HB v. Monroe Woodbury Cent. Sch. Dist.*, 2012  
 7 WL 4477552, at 17 (S.D.N.Y. 2012) (finding that student—who was called  
 8 names such as “whore” and “bitch,” as well as “fucking rat,” “dirty spic,” and  
 9 “gorilla,” and “was physically assaulted in a non-gender-specific way” did not  
 10 plausibly plead that she was harassed *because of* her gender); *Doe ex rel. Conner  
 11 v. Unified Sch. Dist.* 233, 2013 WL 3984336, at 5 (D. Kan. 2013) (“S. and B.J.  
 12 were calling Doe names, such as ‘lard ass,’ ‘faggot,’ and ‘asshole.’ These names  
 13 are certainly inappropriate in any setting. However, middle school boys are not  
 14 held to the same societal standards as adults, and name-calling alone—even  
 15 when it targets differences in gender—will not support a Title IX claim”).  
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 24 Doe does not sufficiently allege that he was bullied,  
 25 harassed, and assaulted because of his gender. Doe  
 26 alleges that his classmates called him “faggot” and  
 27 a “fat ass” (FAC ¶ 36), and his football teammates  
 28 and coaches called him a “pussy,” “bitch,” and  
 29 “baby.” (*Id.* ¶ 25.) The terms “fat ass” and “baby,”  
 30 are not associated with gender, and other courts in  
 this Circuit have found that the terms

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818 W. Riverside, Suite 250

Spokane, WA 99201-0910

(509) 455-5200; fax (509) 455-3632

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1           “pussy,” “faggot,” and “bitch” are also insufficient  
 2           to suggest that a student was harassed on the basis  
 3           of gender.

4           *Doe v. Torrington Bd. of Educ.*, 179 F. Supp. 3d 179, 197 (D. Conn. 2016),  
 5           reconsideration granted in part, 2016 WL 6821061 (D. Conn. 2016).

6           Certainly, the term “faggot” is offensive. It is arguably “tinged with  
 7           offensive sexual connotations.” However, as the foregoing makes clear, the use  
 8           of the term does not support a Title IX claim, as use of the term does not equate  
 9           to discrimination based on gender. There is simply no evidence that suggests that  
 10           Y.A.F. used the term as a comment on I.V.’s sexual orientation. Indeed, there is  
 11           no indication that I.V. is not heterosexual and he has never alleged that he was  
 12           harassed and bullied because he was perceived as being gay. Rather, I.V. has  
 13           alleged that he was harassed and bullied because of his weight.<sup>4</sup>

18           A student making a peer sexual harassment claim  
 19           under Title IX must have been sexually harassed,  
 20           that is, he must have been harassed because of his  
 21           gender. Plaintiff attempts to meet this threshold  
 22           requirement by alleging that he was harassed  
 23           because of his “perceived homosexuality.”  
 24           However, there is not more than a scintilla of  
 25           evidence that any District student actually  
 26           perceived the plaintiff to be homosexual.  
 27           Therefore, any harassment the plaintiff suffered  
 28           was not because of his gender. *See Patterson v.*  
*Hudson Area Schools*, 724 F.Supp.2d 682, 691

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29           <sup>4</sup> Ms. Olivares testified that I.V. told her that he began restricting his food intake  
 30           because of the harassment and bullying.

(E.D.Mich.2010) The evidence plaintiff presents in an attempt to show he was harassed because of his “perceived homosexuality” are instances in which he was called “fag,” “gay”, etc. by other elementary and middle school students. However, such words expressed by this age group do not necessarily mean that plaintiff was harassed because of his perceived homosexuality, and there is not sufficient evidence of such in this case. It should come as no shock that elementary and middle school children call each other “gay” and “fag” quite often. However, they rarely mean it literally. *See id.* at 692. And such expressions can oftentimes be any of a number of generic, interchangeable insults. *See Carmichael v. Galbraith*, 2012 WL 13568 at \*7 (N.D. Tex Jan. 4, 2012)(commenting on student's use of the word “fag” as an insult: “experience and common sense teach that bullies and harassers of this age are not particular about what they say when bullying and harassing their victims”). If, as the *Carmichael* court suggests, “fag” or the like is just one of a range of interchangeable intended insults kids employ against other kids, then one would expect that plaintiff's harassers called him other names which do not have any connotation related to homosexuality. Indeed, this is the situation here. Plaintiff asserts he was called “motherfucker,” an “asshole,” and a “fat fucker” among other things.

*A.E. Evans v. Harrisburg Sch. Dist.* No. 7, 2012 WL 4794314, at 2 (D. Or. 2012)

Similar to the use of the term “faggot,” Y.A.F.’s act of giving I.V. “titty-twisters” does not itself evidence harassment based upon or because of sex, as opposed to being based upon personal animus or

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I.V.'s weight, both of which do not give rise to a Title IX claim. "Personal animus is not gender-based harassment, and cannot form the basis for a Title IX violation." *Nungesser v. Columbia Univ.*, 169 F. Supp. 3d 353, 366 (S.D.N.Y. 2016), *citing Sanches v. Carrollton-Farmers Branch Indep. Sch. Dist.*, *supra*. (dismissing Title IX claim where there was "nothing in the record to suggest" that the harasser "was motivated by anything other than personal animus"); *Eskenazi-McGibney v. Connetquot Central Sch. Dist.*, 84 F.Supp.3d 221, 233 (E.D.N.Y.2015) (dismissing claims where plaintiffs failed to allege non-conclusory facts connecting bullying to student's disabilities, and bullying may have been based on some other reason "such as personal animus").

In *K.S. v. Nw. Indep. Sch. Dist.*, 2015 WL 9450853, at 1 (E.D. Tex. 2015), *report and recommendation adopted sub nom. K.S. b/n/f Neonda Necole Thomas v. Nw. Indep. Sch. Dist.*, 2015 WL 9319982 (E.D. Tex. Dec. 23, 2015), *aff'd sub nom. K. S. v. Nw. Indep. Sch. Dist.*, 689 F. App'x 780 (5th Cir. 2017), the plaintiff alleged that he was verbally harassed every day because he had breasts like a girl, was pigeon-toed and flat footed, walked "funny", and was called gay and fat black boy. The plaintiff also alleged that students would run by and pinch and twist his breasts and comment on how they would jiggle. The plaintiff further alleged that he was subjected to "comments

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1 with sexual overtones like, 'titty boy', 'teddy titty baby', that he had 'bigger  
 2 boobies' or 'bigger titties' than some of the girls" and that "in concert with these  
 3 sexually laced comments he was called the associated terms for a boy who looks  
 4 like [sic] as 'gay', and 'faggot'." Although dicta, in granting summary judgment  
 5 for the defense, the Court noted:

8           Because Defendant does not raise the issue in its  
 9 motion with any specificity, the Court declines to  
 10 address whether all of the allegations made by  
 11 Plaintiffs involve gender or gender-based  
 12 stereotypes but notes that at least some would likely  
 13 be characterized as teasing or bullying because of  
 14 K.S.'s weight, which, although undoubtedly cruel  
 15 and insensitive, is not related to gender and therefore  
 16 not actionable under Title IX. Although same-sex  
 17 sexual harassment is actionable under Title IX, the  
 18 offensive behavior cannot be "merely tinged with  
 19 offensive sexual connotations" but must be based on  
 20 sex. *Sanchez*, 647 F.3d at 165 (internal citations  
 21 omitted) (finding that a singular reference to the  
 22 plaintiff as "ho", slapping of buttock of another  
 23 student and starting of pregnancy and hickey rumor  
 24 were "more properly described as teasing or  
 25 bullying than as sexual harassment" and not enough  
 26 to create fact issue on the plaintiff's Title IX claim).  
 27 And, as to any teasing because of K.S.'s weight, in  
 28 *Davis*, the Supreme Court specifically cautioned  
 29 against construing its holding to extend Title IX  
 30 liability for teasing or offensive name calling of an  
 "overweight child who skips gym class because the  
 other children tease her about her size." *Davis*, 526  
 U.S. at 652, 119 S.Ct. at 1675-76.

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1 *K.S. v. Nw. Indep. Sch. Dist.*, 2015 WL 9450853, at 5.

2 Finally, it is significant that Y.A.F. did not harass and bully only I.V., but  
3 also harassed and bullied I.V.'s friends. This certainly suggests that Y.A.F. was  
4 not targeting I.V. based on or because of sex, but rather that he was simply a  
5 bully. I.V. simply cannot establish that the harassment and bullying were based  
6 on or because of sex. Summary dismissal of his Title IX is therefore proper.

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10 **B. WSD Did Not Have Actual Knowledge Of Harassment And Bullying  
11 Based On Sex And Act With Deliberate Indifference To The Same.**

12 To maintain his Title IX cause of action, I.V. must establish that an  
13 appropriate school official actually knew that he was being sexually harassed or  
14 abused. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 283, 118 S.Ct.  
15 1989 (1998). “[I]t is generally accepted that the knowledge must encompass  
16 either actual notice of the precise instance of abuse that gave rise to the case at  
17 hand or actual knowledge of at least a significant risk of sexual abuse.” *Ross v.  
18 Corp. of Mercer Univ.*, 506 F.Supp.2d 1325, 1347–48 (M.D.Ga.2007). Thus, it is  
19 not enough to show that the school district “should have known” of the abuse.  
20 *Gebser*, 524 U.S. at 283; *Reese*, 208 F.3d at 739; *Gabrielle M. v. Park Forest–  
21 Chicago Heights, Ill. Sch. Dist.* 163, 315 F.3d 817, 823 (7th Cir.2003).

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In addition to establishing actual knowledge of sexual discrimination, I.V.

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1 must establish that WSD acted with deliberate indifference to that knowledge.  
 2 “Damages under Title IX are available only if an official with authority to  
 3 address the alleged discrimination and institute corrective measures has actual  
 4 knowledge of the discrimination and fails to adequately respond—*i.e.*, acts with  
 5 deliberate indifference.” *Doe v. Willits Unified School Dist.*, 473 Fed. Appx. 775  
 6 (9th Cir. 2012), *citing Gebser*, 524 U.S. at 290. The test for deliberate  
 7 indifference is “whether a reasonable fact-finder could conclude that the  
 8 College’s response was ‘clearly unreasonable in light of the known  
 9 circumstances.’ ... In other words, we must decide whether, on this record, one  
 10 could find that the College made ‘an official decision ... not to remedy the  
 11 violation.’ ” *Oden v. Northern Marianas College*, 440 F.3d 1085, 1089 (9th Cir.  
 12 2006), *quoting Davis v. Monroe County Bd. of Educ.*, 526 U.S. at 641 and  
 13 *Gebser*, 524 U.S. at 290. To “meet this high standard there must, in essence, be  
 14 an official decision not to remedy the violation and this decision must be clearly  
 15 unreasonable.” *Doe v. Willits Unified School Dist.*, at 775–76; *see also Monteiro*,  
 16 158 F.3d at 1034, *quoting City of Canton, Ohio v. Harris*, 489 U.S. 378, 388–92  
 17 (1989) (“[T]he district is liable for its failure to act if the need for intervention  
 18 was so obvious, or if inaction was so likely to result in discrimination, that ‘it can  
 19

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1 be said to have been deliberately indifferent to the need.””).

2       Here, since I.V. was not being harassed or bullied “because of sex,” WSD  
3 obviously could not have actual knowledge of sexual discrimination or acted  
4 with deliberate indifference to such knowledge. However, even assuming a  
5 question of fact on that issue, I.V. cannot establish the actual knowledge and  
6 deliberate indifference elements of his Title IX claim.

7       There are two persons who I.V. will presumably argue had notice of the  
8 harassment and bullying: (1) Ms. Brender; and (2) Ms. Brown/Ms. Self.  
9 Assuming the facts in the light most favorable to I.V., the notice received by Ms.  
10 Brender, Ms. Brown and Ms. Self does not support a Title IX claim.

11       **Ronda Brender:** According to Ms. Olivares, she reported to Ms. Brender  
12 that an unknown student was calling I.V. names (fat and faggot) and twisting his  
13 nipples. Assuming that this report was sufficient to establish actual knowledge  
14 that I.V. was being discriminated against because of sex, I.V.’s Title IX claim  
15 fails because Ms. Brender did not act with deliberate indifference upon receipt of  
16 that knowledge. Instead, Ms. Brender contacted Mr. Donaldson to find out if he  
17 had observed any harassment or bullying of I.V. When Mr. Donaldson denied  
18 the same, Ms. Brender asked Mr. Donaldson to keep on the lookout for any  
19 bulling of I.V. Ms. Brender also worked with Ms.

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1 Olivares to change I.V.'s schedule so that when he returned to school he would  
 2 not have to attend P.E. class (where the bullying was allegedly occurring). As a  
 3 matter of law, Ms. Brender's actions in this regard preclude a finding of  
 4 deliberate indifference. "Institutions 'are deemed "deliberately indifferent" to  
 5 acts of student-on-student harassment only where the recipient's response to the  
 6 harassment or lack thereof is clearly unreasonable in light of the known  
 7 circumstances.'" *Moore v. Regents of the Univ. of California*, 2016 WL  
 8 4917103, at 3 (N.D. Cal. 2016), quoting *Davis*, 526 U.S. at 648. Deliberate  
 9 indifference "requires a showing of a response that was more deficient than  
 10 merely 'negligent, lazy, or careless.'" *Id.*, quoting *Oden v. N. Marianas Coll.*,  
 11 440 F.3d 1085, 1089 (9th Cir. 2006). It requires an "official decision ... not to  
 12 remedy the situation." *Oden*, 440 F.3d at 1089 (quoting *Gebser v. Lago Vista*  
 13 *Indep. Sch. Dist.*, 524 U.S. at 290. "Significantly, Title IX does not require that  
 14 an institution 'remedy' peer harassment, but simply that it 'respond to known  
 15 peer harassment in a manner that is not clearly unreasonable.'" *Butters v. James*  
 16 *Madison Univ.*, 208 F.Supp.3d 745, 754 (W.D. Va. 2016), quoting *Davis*, 526  
 17 U.S. at 648–29.

27 **Ms. Brown/Ms. Self:** The knowledge Ms. Brown and Ms. Self allegedly  
 28 received came from M.V. (I.V.'s best friend). Ms.

29  
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 (509) 455-5200; fax (509) 455-3632

1 Brown did not act upon the reports.<sup>5</sup> However, as a matter of law, the  
 2 information allegedly reported to Ms. Brown and Ms. Self was not notice of  
 3 harassment and bullying based on or because of sex. Instead, M.V. testified that  
 4 he told Ms. Brown and Ms. Self that I.V. was being “picked on” and “bullied.”  
 5 There was absolutely nothing about M.V.’s report that indicated that the conduct  
 6 in question had any sexual component to it. Ms. Brown’s and Ms. Self’s  
 7 purported failure to act upon reports that a student was being “picked on” and  
 8 “bullied,” without any indication of sexual discrimination, simply does not give  
 9 rise to a Title IX claim. *See, e.g., Rost ex rel. K.C. v. Steamboat Springs RE-2*  
 10 *Sch. Dist.*, 511 F.3d 1114, 1119 (10th Cir. 2008) (“The district court held that  
 11 K.C.’s complaints that boys were “bothering her” as relayed to the district were  
 12 insufficient to constitute actual notice of sexual harassment, and that, in the  
 13 absence of anyone knowing that the sexual harassment was occurring, a  
 14 negligent failure to investigate Ms. Rost’s generalized complaints did not result  
 15 in Title IX liability. We agree”). Title IX simply does not protect against  
 16 bullying or getting “picked on” that are not based on or because of sex. As such,  
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28 <sup>5</sup> Ms. Brown and Ms. Self deny having received any reports from M.V., which is  
 29 why there was no action taken by either individual. For summary judgment  
 30 purposes, however, the Court must assume M.V.’s testimony to be accurate.

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 818 W. Riverside, Suite 250  
 Spokane, WA 99201-0910  
 (509) 455-5200; fax (509) 455-3632

1 the notice to Ms. Brown and Ms. Self that I.V. was being bullied and picked on  
2 does not give rise to a Title IX claim.  
3

4 **IV. CONCLUSION**  
5

6 I.V. was harassed and bullied by Y.A.F. However, there is no evidence to  
7 support the conclusion that the harassment and bullying was based on or because  
8 of sex. Instead, it appears that the harassment and bullying was based upon I.V.'s  
9 weight, as best demonstrated by the names Y.A.F. called him ("fat" and "man  
10 boobs"). There is also, of course, the likelihood that the harassment and bullying  
11 was motivated by a personal animus against I.V. Whether the harassment and  
12 bullying was motivated by I.V.'s weight, or from personal animus, it is not  
13 protected by Title IX. Given the absence of evidence that Y.A.F.'s conduct was  
14 motivated by sex, I.V. cannot establish the necessary sexual discrimination to  
15 support a Title IX claim. Summary judgment is therefore proper.  
16

17 DATED this 16<sup>th</sup> day of July, 2018.  
18

19 EVANS, CRAVEN & LACKIE, P.S.  
20

21 By: s/ Michael E. McFarland, Jr.  
22 Michael E. McFarland, Jr., #23000  
23 Sean E. Harkins, #51113  
24 Attorneys for Wenatchee School District  
25 And School District Defendants  
26

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*Evans, Craven & Lackie, P.S.*  
818 W. Riverside, Suite 250  
Spokane, WA 99201-0910  
(509) 455-5200; fax (509) 455-3632

## CERTIFICATE OF SERVICE

I hereby certify that on July 16, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following:

Scott A. Volyn  
Volyn Law Firm  
23 South Mission Street, Suite B  
Wenatchee, WA 98801  
Email: [scott@volynlawfirm.com](mailto:scott@volynlawfirm.com)

I hereby further certify that I have caused to be served a true and correct copy of the foregoing document(s) on the non-CM/ECF participants as indicated:

Maria M. Perez Flores  
1121 Cashmere St  
Wenatchee, WA 98801

Via Regular Mail  [X]  
Via Certified Mail  [ ]  
Via Overnight Mail  [ ]  
Via Facsimile  [ ]  
Hand Delivered  [ ]

## EVANS, CRAVEN & LACKIE, P.S.

By: s/ Michael E. McFarland, Jr.  
MICHAEL E. McFARLAND, #23000  
Attorney for Defendant  
Evans, Craven & Lackie, P.S.  
818 W. Riverside Ave., Suite 250  
Spokane, Washington 99201  
(509) 455-5200  
(509) 455-3632 Facsimile  
[MMcFarland@ecl-law.com](mailto:MMcFarland@ecl-law.com)

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*Evans, Craven & Lackie, P.S.*  
818 W. Riverside, Suite 250  
Spokane, WA 99201-0910  
(509) 455-5200; fax (509) 455-3632